

**SCANNED**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ORIGINAL

31/05

UNITED STATES OF AMERICA  
ex rel JOHN BAX  
REGISTER NO. 07328-067

RECEIVED

JUN 22 2005

PETITIONER

CLERK U.S. DISTRICT COURT  
WEST. DIST. OF PENNSYLVANIA  
Docket No. 05-194 Crd

v.

WARDEN, FCI MCKEAN,

RESPONDENT.

PETITION FOR WRIT OF HABEAS CORPUS  
BY PERSON IN FEDERAL CUSTODY(1)  
mcs

1. PLACE OF DETENTION: FCI MCKEAN, BOX 8000, BRADFORD, PA 16707
2. NAME AND LOCATION OF COURT WHICH IMPOSED SENTENCE.

United States District Court, For the Middle District of  
Pennsylvania.

3. THE INDICTMENT NUMBER OR NUMBERS UPON WHICH AND THE OFFENSE  
OR OFFENSES FOR WHICH SENTENCE WAS IMPOSED:

93-CR-117-02

4. THE DATE UPON WHICH SENTENCE WAS IMPOSED AND THE TERMS OF THE  
SENTENCE.

February 16, 1994, 286 Months imprisonment.

5. PETITIONER ENTERED A NOT GUILTY PLEA.

6. IF YOU WERE FOUND GUILTY AFTER A PLEA OR NOT GUILTY, CHECK  
WHETHER THAT FINDING WAS MADE BY A JURY/A JUDGE WITHOUT A JURY.

Jury

7. DID YOU APPEAL FROM THE JUDGMENT OF CONVICTION OR THE IMPOSITION  
OF SENTNECE?

Yes.

8. IF YOU ANSWER "YES" TO (7), LIST

(a) THE NAME OF EACH COURT TO WHICH YOU APPEALED: United States Court of Appeals for the Third Circuit.

(b) THE RESULT IN EACH COURT TO WHICH YOU APPEALED: Convictions affirmed.

(c) THE DATE OF EACH RESULT: August 18, 1994.

(d) IF KNOWN, CITATIONS OF ANY WRITTEN OPINION OR ORDER ENTERED PURSUANT TO SUCH RESULTS: N/A

9. STATE CONCISELY ALL THE GROUNDS ON WHICH YOU BASE EACH ALLEGATION THAT YOU ARE BEING HELD UNLAWFULLY:

A. The conviction was obtained and/or sentence imposed in violation of the Sixth Amendment of the Constitution of the United States.

B. The conviction was obtained and/or sentence imposed in violation of the Fifth Amendment of the United States Constitution.

10. STATE CONCISELY AND IN THE SAME ORDER THE FACTS WHICH SUPPORT EACH OF THE GROUNDS SET OUT IN (9):

See attached Memorandum of Law in support of Petition for Writ of Habeas Corpus, a copy of which is attached hereto and incorporated by reference herewith.

11. HAVE YOU PREVIOUSLY FILED PETITIONS FOR HABEAS CORPUS, MOTIONS UNDER SECTION 2255 OF TITLE 28, UNITED STATES CODE, OR ANY OTHER APPLICATION, PETITIONS OR MOTIONS WITH RESPECT TO THIS CONVICTION?

Yes.

12. IF YOU ANSWER "YES" TO (11), LIST WITH RESPECT TO EACH PETITION, MOTION OR APPLICATION.

(a) THE SPECIFIC NATURE THEREOF.

1. Motion to Vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.S. § 2255.

2. Application for Certificate of Appealability.

(b) THE NAME AND LOCATION OF THE COURT IN WHICH EACH WAS FILED.

1. United States District Court, For the Middle District of Pennsylvania.

2. United States Court of Appeals for the Third Circuit.

(c) THE DISPOSITION THEREOF:

1. Denied.

2. Denied.

(d) THE DATE OF EACH DISPOSITION

1. May 23, 1997.

2. September 24, 1997.

(e) IF YOU DID NOT FILE A MOTION UNDER SECTION 2255 OF TITLE 28, UNITED STATES CODE, [OR IF YOU FILED SUCH A MOTION AND IT WAS DENIED] STATE WHY YOUR REMEDY BY WAY OF SUCH MOTIONS IS INADEQUATE OR INEFFECTIVE TO TEST THE LEGALITY OF YOUR DETENTION.

Petitioner was denied an evidentiary hearing on the issues raised in his 2255 Habeas Corpus Petition. The Third Circuit denied Petitioner's Application for Certificate of Appealability on September 24, 1997.

On February 20, 2001, the district court for the Middle District of Pennsylvania denied Bax's motion pursuant to Rule 35(a) and 18 U.S.C. § 3582(c)(1)(A)(i). That motion raised an Apprendi v. New Jersey, 120 S.Ct. 2348 (2000) claim. The district court directed Bax to petition the Third Circuit for permission to file a Second or Successive 2255 motion.

On April 20, 2001, the Third Circuit denied Petitioners section 2244 application in which he sought permission to file a Second or Successive motion in the district court pursuant to 28 U.S.C. § 2255 based on Apprendi v. New Jersey, 120 S.Ct. 2348 (2000).

As demonstrated in the attached memorandum of law, the remedy by 2255 motion proved inadequate and ineffective to test the legality of Petitioner's detention and he may therefore, apply for relief under 28 U.S.C. § 2241. In Re Hanserd, 123 F.3d 922, 929 (6th Cir. 1997), In Re Dorsainville, 119 F.3d 245 (3rd Cir. 1997), Triestman v. United States, 124 F.3d 361 (2nd Cir. 1997). See also

Kolster v. INS, 101 F.3d 785 (1st Cir. 1996)[§2241 habeas remedies available when other remedies are not.].

14. HAS ANY GROUND SET FORTH IN (9) BEEN PREVIOUSLY PRESENTED TO THIS OR ANY OTHER FEDERAL COURT BY WAY OF PETITION FOR HABEAS CORPUS MOTION UNDER SECTION 2255 OF TITLE 28, UNITED STATES CODE, OR ANY OTHER PETITION, MOTION OR APPLICATION?

Yes.

15. IF YOU ANSWERED "YES" TO (14), IDENTIFY WHICH GROUNDS HAVE BEEN PREVIOUSLY PRESENTED.

A. The conviction was obtained and/or sentence imposed in violation of the Sixth Amendment to the Constitution of the United States.

B. The conviction was obtained and/or sentence imposed in violation of the Fifth Amendment of the United States Constitution.

16. WERE YOU REPRESENTED BY AN ATTORNEY AT ANY TIME DURING THE COURSE OF

(a) YOUR ARRAIGNMENT AND PLEA? No.

(b) YOUR TRIAL, IF ANY? Yes.

(c) YOUR SENTENCING? Yes.

(d) YOUR APPEAL? Yes.

(e) PREPARATION, PRESENTATION, OR CONSIDERATION OF ANY PETITION, MOTIONS OR APPLICATIONS WITH RESPECT TO THIS CONVICTION WHICH YOU FILED? Yes.

17. IF YOU ANSWERED "YES" TO ONE OR MORE PARTS OF (16), LIST

(a) THE NAME AND ADDRESS OF EACH ATTORNEY WHO REPRESENTED YOU:

PLEA - N/A

TRIAL - Jeffrey N. Yoffe, Esquire, Yoffee & Yoffee, P.C., Suite 2412, City Towers, 301 Chestnut Street, Harrisburg, PA 17101.

SENTENCING - Idem.

DIRECT APPEAL - Scott Brettschneider, Esquire, 125-10 Queens Boulevard, Suite 2701, Kew Gardens, NY 11415.

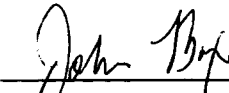
FIRST PETITION TO VACATE, SET ASIDE OR CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255 - N/A.

CERTIFICATE OF APPEALABILITY - Cheryl J. Sturm, Esquire,  
P.O. Box 210, Westtown, Pa 19395.

18. IF YOU ARE SEEKING LEAVE TO PROCEED IN FORMA PAUPERIS, HAVE  
YOU COMPLETED THE SWORN AFFIDAVIT SETTING FORTH THE REQUIRED  
INFORMATION IN INSTRUCTIONS, PAGE 1 OF THIS FORM? N/A.

I, John Bax, state under penalty of perjury that the fore-  
going is true and correct.

EXECUTED ON 6/20/05

  
\_\_\_\_\_  
John Bax